

Stuckey Insurance 2015 Risk Management Seminar

GO/NO GO CHECKLIST FOR PROJECT RISK MANAGEMENT

Planning To Avoid Claims And Disputes

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GO/NO GO CHECKLIST FOR PROJECT RISK MANAGEMENT

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INTRODUCTION

Design professionals who systematically evaluate new clients and potential projects, including the proposed contract, are better able to identify and weigh those uncertainties or adverse contract terms that must be resolved before signing a contract that might result in claims, disputes, or risk to their professional license. The Go/No Go Checklist is an essential element of any good risk management plan because it provides a template for assessing project risk and reviewing contracts. The Checklist trains project management and business development staff to spot issues that require further assistance from legal and insurance advisors, and elevate to upper management or in-house counsel the decision on whether to proceed with a project that does not meet the firm's target profit range or risk profile. An effective risk management plan assures that identified risks with significant impacts are documented and assigned to that person or party who has the responsibility, authority and resources to manage that risk.¹ The term risk in this sense means uncertainty; a potential occurrence that could have either positive or negative outcomes depending on whether it was anticipated and how it is addressed.

A recent survey of owners, design professionals and contractors summarized the leading causes of uncertainty in design and construction projects that adversely affect cost, schedule and quality of the completed work.² While the three groups surveyed had somewhat different priorities, the seven leading drivers of project uncertainty as to construction cost, ranked by frequency and severity, were:

FREQUENCY AND COST IMPACT OF TOP CAUSES OF PROJECT UNCERTAINTY	INDEX (1-100)
Owner-Driven Changes	84
Design Omissions	59
Construction Coordination Issues	53
Unforeseen Site or Construction Issues	51
Design Errors	50

¹ ISO 10006-2003(E) *Guidelines for Quality Management In Projects*, Clause 7.7.2

² *Managing Uncertainty and Expectations in Building Design and Construction*, McGraw Hill Construction in Partnership with the AIA Large Firm Roundtable (2014)

FREQUENCY AND COST IMPACT OF TOP CAUSES OF PROJECT UNCERTAINTY	INDEX (1-100)
Accelerated Schedule	38
Contractor-Caused Delays	37

The Go/No Go Checklist included at the end of this paper considers these uncertainties and the manner in which they are addressed in the proposed contract so that adverse outcomes can be avoided or mitigated. The Checklist is intended to be a living document, one that can be adapted and expanded for assessing the unique risks of a particular professional discipline, client, site or project type.

CHOOSING A CONTRACT DOCUMENT SYSTEM

As most liability claims against design professionals are asserted by their own clients (rather than contractors or third parties), a fair and balanced contract is essential for managing project risks. Due to the complexity of most projects of any significant value, we recommend against reliance on letter agreements, short form proposals, or corporate purchase orders to document agreements for professional services. This paper does not advocate for the use of one contract documents system over another. All have their strengths and weaknesses, and few document systems are suitable for every project type or delivery method. Users must carefully evaluate their needs to determine which system, or combination of documents, best suits their interests and the project at hand. Legal counsel and insurance advisors should review and modify all contracts—even standard forms of agreement—to account for local law and the unique allocation of duties, rights, and remedies discussed in this Checklist.

American Institute of Architects: AIA publishes integrated contract documents for projects of different scopes and complexity using the conventional design-bid-build format, as well as several contract forms for construction manager-at-risk (CMAR) and design-build projects that contemplate either a contractor or architect-lead design-build team or joint venture. The AIA design-build family of documents has expanded to include an agreement for bridging services (programming, conceptual estimating, and data collection). The AIA design-build documents have integrated general conditions and do not require adaptation of other AIA contract documents. AIA contracts can be used in lump sum, cost-plus-fee, and GMP pricing methods. www.aia.org

ConsensusDocs: Evolving from the Associated General Contractors documents system, the ConsensusDocs contracts family includes agreements for use by owners, design professionals, and contractors, and include one of the oldest documents in general use for design-build projects. These forms have been updated and expanded several times since their original publication. The ConsensusDocs forms assume a contractor-lead design-build team and is notable because it includes SOQ's, agreements for preliminary services (primarily programming), prime contracts, subcontracts, bonds, and construction administration forms necessary for a complete and integrated set of design-build contracts. www.consensusdocs.org. Design professionals must still be wary that ConsensusDocs agreements do not fairly represent their interests.

Design-Build Institute of America: The Design-Build Institute of America (DBIA) is committed to promoting design-build construction and developing a set of contract documents written

specifically for this project delivery method. DBIA has devoted considerably more attention to the allocation of risks and duties in the design-build process than other organizations. DBIA has also created a very comprehensive set of documents for the primary contractual relationships on a design-build project, but it has not published any forms needed for contract for administration. www.dbia.org

Engineers Joint Contract Documents Committee: EJCDC was founded by the National Society of Professional Engineers, American Society of Civil Engineers –Construction Institute, and American Council of Engineering Companies to develop standard contract forms for public works and private sector projects. This organization has also had many years of experience in writing contract forms for conventional design-bid-build, CMAR and design-build projects, and it has one of the more comprehensive set of contract forms and project administration documents for design-build available today. EJCDC has taken a more owner-oriented approach in its design-build documents than any of the other main systems. Unlike the forms developed by AGC, AIA, and DBIA, the EJCDC documents assume that the owner will develop and manage its own program and scope documents using a design professional retained for that purpose. They also give the design-builder less flexibility to initiate changes in that scope. www.ejcdc.org and member organizations

The successful project depends on the negotiation of contracts that balance the competing interests of owner, design-builder, design professional team, and trade contractors on a number of significant legal issues.

CHOICE OF ENTITY OR TEAM ARRANGEMENT:

When pursuing work in a new jurisdiction, determine whether the design professional's legal entity may qualify to do business in that state or province. Some states will not license limited liability companies and others prohibit ownership by non-registrants. This legal constraint can affect the choice of entity used for a particular project.

Participation in design team joint ventures or design-build and integrated project delivery (IPD) teams can also have a significant impact on licensing, insurance, risk allocation and project management responsibilities. While a design professional's typical practice insurance coverage will cover its services in a joint venture with another design professional or as a subcontractor to a design-builder, additional coverage must be obtained when the design professional assumes responsibility for managing construction as a design-builder or member of an IPD team. Insurance for contractors general liability, workers compensation, incidental pollution coverage, and rectification coverage (where available) should also be obtained when acting as a design-builder or IPD team.

LICENSING:

Design professionals should seek professional registration in a new state or province before issuing a proposal or signing a contract for a project in that jurisdiction. Penalties for unauthorized practice can be imposed for submitting a proposal or performing preliminary design services (such as a design competition) prior to seeking registration.

Some jurisdictions provide temporary licenses (colloquially referred to as “fishing licenses”) authorizing a design professional to submit a proposal or negotiate contract, provided full registration is obtained by the time services are rendered.

Start early on license applications and obtain NCARB certificates or NCEES Model Law records when possible to speed comity registrations. For design-build projects, confirm whether state law permits this delivery method and the license or professional registration required to perform such services. Arizona has no restrictions on ownership of either construction companies or design firms so long as each entity or responsible principal (in the case of design firms) is properly licensed for the services it provides. All design-build entities must have an Arizona contractor’s license for any construction or construction management services they will provide. Joint ventures will comply with the contractor license laws so long as the joint venture member supervising the construction work is properly licensed. Construction companies who elect to provide in-house design services must file a firm card with the Arizona Board of Technical Registration (BTR) identifying the registered principal in charge of those services. The contractor and its registered professional will be subject to BTR regulation of any in-house design services.

COMPLIANCE WITH LAWS AND CODES

Requiring the design professional to “comply with all laws” can result in unanticipated liability exposure due to the breadth of that obligation. Violation of any statute, building code, ordinance or regulation, regardless of whether the design professional’s services encompassed that requirement, can trigger a presumption of professional negligence or breach of contract claim.

Design professionals should commit only to use their professional judgment and due care to “comply with those codes or laws applicable to design and construction of the project, such as building codes, fire prevention codes, or the Americans with Disabilities Act, in effect at the time the project is designed.”

Likewise, the design professional should not obligate itself to incorporate code changes occurring after a complete set of construction documents are delivered to the client. Re-design due to code changes or unanticipated code interpretations by building inspectors is an additional service and compensated as such.

PROJECT SCOPE, SCHEDULE & BUDGET:

Many inexperienced design professionals encounter unexpected trouble when they agree to a lump sum or not-to-exceed (NTE) fee without having a fully defined scope, schedule and budget for the project. A project that starts without a budget or schedule is more likely to end in a dispute or claim. The client’s requirements must be identified and developed through preliminary design services to the point that a proper scope and fee may be agreed before design development begins. When a Building Information Model

(BIM) is utilized, the design professional must determine the client's expectations for the BIM deliverables, who will be the designated BIM manager, and front-load its fee to account for the fact that design optimization happens during design development in a BIM project. Not every project needs, or benefits from, a BIM, and not every component in a BIM project needs to be modeled. Whenever possible, seek design-phase cost estimates from the contractor who will build the project to assure the design solution remains within budget. This is a notable benefit of CMAR, design-build and IPD delivery methods.

RESPONSIBILITY FOR COST OVERRUNS:

The contract documents should clearly identify the limits on the design professional's responsibility for cost estimating, and the consequences of bids exceeding the client's budget. The design professional should not accept contract terms imposing financial responsibility for bid prices in excess of budget. Rather, its obligation should be limited to assisting the client through re-design or adjustment of specifications, quantities, or quality levels, to achieve the desired project budget. Care must be taken on design-build projects to allocate this risk factor for cost overruns as between the design-builder and its design consultants. Where the design-builder assumes responsibility to the owner for a turn-key project, unanticipated cost overruns due to design errors and omissions may lead to professional liability claims against the design professional.

RESPONSIBILITY FOR DESIGN SCHEDULE:

Regardless of the project type or delivery method, sufficient time must be allowed for design development. The contract should require a schedule allowing time for review and approval of the design and construction documents by the client, owner, third-party reviewers, and permitting authorities with the further right to equitable adjustment for any delays not caused by the design team. Design professionals should resist attempts to impose liquidated damages or other penalties for delay in completing the design documents as, all too frequently, schedule compression can occur due to changes in directions given by the client or owner and delays in obtaining review and approval of the design and construction documents by others.

DOCUMENTATION OF SCOPE:

Accurate documentation of the project scope and owner requirements is essential for accurate estimation of project costs and development of an optimal design solution. Likewise, it is the best protection against unexpected scope creep, design or construction coordination problems, and client dissatisfaction with the completed project. Poorly defined scopes can also lead to poorly executed projects that fail to satisfy the owner's needs, or over-designed projects that are wasteful of the owner's resources. Many inexperienced design professionals encounter problems—and later disputes—when they start construction on a fast-track basis with incomplete construction documents or poorly-

documented owner approvals. Fast track construction also contributes to unexpected costs for re-design and corrective work during construction. Design professionals should guard against these risks by documenting the project scope and design approvals.

DETERMINING THE DESIGN PROFESSIONAL'S FEE:

The contract should clearly state what services are included in the contract scope, how the fee for those services will be calculated, and when it will be paid. If the proposed fee is inadequate for the scope of services or the schedule on which the services are performed, this is a potential No Go decision factor. Lump sum fees computed as a percentage of construction value can also lead to disputes and client dissatisfaction as it is often difficult to obtain payment for additional services caused by owner-requested changes or when “value engineering” reduces the construction value of the project.

Conditions allowing the design professional to charge for additional services, and a scheduled end date for the project should be included in the contract so that the design professional can be paid for services that were not anticipated at the time of contract execution.

DESIGN REVIEW AND APPROVAL:

The contract should specify the procedures or stages at which approvals of the design and updated cost estimates are required by the owner, the jurisdictional authority (if necessary), and any users or other third parties (such as franchisors, lenders or investors) who must approve the final design solution. These approvals must be obtained on a timely basis to avoid delays in procurement, fabrication, and construction. Likewise, the owner and users must be advised that approval of each stage in the design process will authorize commencement of the following phase of the work and a commitment to adjust the schedule, scope or fee if changes are made after that approval is given.

CONTINGENCIES:

A prudent client will establish design and construction contingencies in its project budget to assure funding is available for unanticipated deviations from the original design. An inadequate contingency is a negative factor in the Go/No Go decision. If the design professional is participating in a design-build project involving negotiation of the guaranteed maximum price for construction based on incomplete design documents, it should negotiate a fee from the design-builder that includes an adequate design contingency for unanticipated changes in that design following award of the project.

OWNER PROVIDED SERVICES:

The design professional can share or shed some project risk by having the owner provide essential services such as geotechnical testing, environmental assessments or

remediation, permitting, cost estimating, or feasibility analysis. The owner may also wish to assume responsibility for a portion of the procurement function such as interior design, or purchase of furniture, fixtures and equipment. The design professional's contract must identify which services will be provided by the owner or third parties, assure that it can rely on any information provided by those parties, and coordinate the delivery of third party services with the overall project schedule so as not to delay completion.

WARRANTIES:

Contractual warranties or guarantees that the design will be complete, free from defects, or "fit for the intended use" are uninsurable and should be avoided. At best, the design professional can warrant it is properly licensed in the jurisdiction in which the services are performed and it will exercise due care and its best professional skill and judgment in performing its services.

The design professional should also avoid contract terms requiring it to pay for the additional cost of construction to correct errors or supplement omissions in the construction documents. Rectification requirements do not respect standard of care and often result in a windfall to the client for any betterment provided. Our rule of thumb is that the client should pay for any work that would have been its cost if the correct or omitted element was included in the construction documents at the time of bidding. Uninsurable warranties and guarantees are a significant negative evaluation factor in the Go/No Go Checklist.

STANDARD OF CARE:

The design professional is not legally obligated to produce a perfect set of plans, or to assure that the client will not incur any cost increase or design change during construction—unless it agrees to do so by contract. The standard of care requires the exercise of professional skill, training and experience comparable to that employed by peers working in the same professional community at the same time. This consensus standard of professional conduct is not the *highest* standard; nor is it the same as the personal standard of a particular design professional. It is intended to be the consensus standard in the community for a minimum acceptable outcome, performance, or quality.

Contract terms that obligate the design professional to design to the "highest and best" or "first class in every way" standard of practice should be avoided at all costs as they may be uninsurable. Heightened standard of care provisions are a negative factor in the Go/No Go decision process.

QUALITY LEVELS:

While not often embodied in a particular contract term, agreement on acceptable quality levels or performance standards is essential for the successful development and execution

of a contract for professional services. The design professional must assist its client in setting expectations for scope, budget, function, materials or equipment choices, and the quality of finishes or measure of performance deemed acceptable. Where reference is made to external design or measurement standards, the design professional must take care to avoid accepting a higher standard of performance than it anticipated when executing the contract. Quality level requirements, like many other aspects of the prime professional's contract with its client, must also be flowed down to subconsultants to assure effective delegation and accountability.

CONSTRUCTION SUPERVISION:

Responsibility for the “means and methods” or sequence of construction, site safety, and the supervision of trade contractors should be assigned to the contractor or design-builder as the party with the authority and resources to discharge this duty. The responsibilities for supervision of construction operations must be appropriately defined so that the owner and trade subcontractors have a clear understanding of the chain of command.

The design professional should not assume responsibility for construction supervision as that can trigger liability exposure for which it is not insured, and which may exceed the scope of its professional registration. If the proposed contract creates a duty for the design professional to supervise the trade contractors, that is a negative evaluation factor in the Go/No Go Checklist.

INSPECTIONS:

The contract documents must provide for the employment of any inspectors required by the building department or recommended practice to assure proper performance of the contract documents. While it is reasonable for the design professional to provide certain code-required special inspections or special observations, care must be taken to avoid a conflict between the contractual assignment of responsibilities and applicable law. In Arizona and most other jurisdictions, professional practice rules obligate design professionals to notify the owner, building official and/or state registration board of any conditions (known to them) that present an imminent threat to public health safety and welfare.

Design professionals providing construction observation or inspection services, should confirm in their contract that this service does not render them liable for the contractor's failure to perform its obligations.

INSURANCE:

Insurance requirements can also be problematic since most industry standard contract forms do not specify required limits of coverage or detailed insurance requirements. On the other extreme, client-drafted forms of agreement often require expensive additional

coverage long after the project is complete and terms the design professional may not be able to satisfy. Contracts requiring that the client be named an additional insured on the design professional's professional liability policy, advance notice of a "reduction" or "material change" in the terms or limits of coverage, or continued coverage for after completion of the project should be flagged for negotiation or a possible No Go decision.

The client is not entitled to additional insured status on the professional liability policy because the policy form does not permit such an extension of coverage. It would be impractical in any case because an insured under a professional liability policy is barred from suing another insured. Once this limitation is explained, most clients drop their demand for additional insured status.

Promising to give the client advance, written notice of reductions or material changes in coverage is also impractical, as the insurer will not honor such a requirement and it is not always possible to determine what policy changes might trigger such a notice. Likewise, promising to maintain professional liability coverage for an extended period of time after the project is complete can be an unreasonably burdensome and expensive unless the client will pay for an extended reporting period endorsement or project policy.

Insurance requirements are a major evaluation factor in the Go/No Go Checklist. Design professionals must carefully assess insurance coverage requirements to make certain they have not assumed obligations excluded from coverage under their professional liability or other insurance policies.

Each carrier handles these issues somewhat differently. Nonetheless, some common risks that may be excluded from coverage, include:

- Insolvency or bankruptcy of the insured
- Cost to repair or replace faulty workmanship
- Criminal, dishonest, fraudulent, or malicious conduct
- Claims by one insured against another insured
- Claims by an entity that the insured controls or manages, or in which it has a controlling ownership interest
- Warranties or guarantees
- Claims based on material facts that were not disclosed to the insurer at the inception or last renewal of the policy; any effort by the insured to mislead the insurer
- Claims arising from goods or software designed or manufactured by the insured
- Intentional or dishonest acts

- Environmental hazards (but this can be removed by endorsement)
- Liability assumed by contract (e.g., indemnities) unless there would be a claim based on professional negligence in the absence of a contract
- Punitive damages, fines, or administrative penalties (this exclusion is being removed by many carriers from their basic policy, or it may be removed by endorsement)

Design professionals should also assure that subconsultants are adequately insured, and that the obligations of the prime professional's agreement flow down to them, or else seek a waiver of these insurance requirements from the client as to a subconsultant who cannot satisfy them.

INDEMNITIES:

The indemnity term can create significant financial burdens and liability exposures for the design professional. Worse yet, many indemnity obligations may not be covered by the architect or engineer's professional liability insurance. If the indemnity imposes a duty to defend the client or third parties, if it is not triggered by the design professional's fault, or if it requires the design professional to pay damages caused in whole or in part by the indemnified party, it will not be fully insurable. When the client is unwilling to narrow the indemnity to comply with statutory limits on indemnification or insurability requirements, this risk alone may justify a No Go decision.

In comparative fault jurisdictions like Arizona, overbroad indemnities are not necessary because the law generally holds everyone accountable for their own fault. The industry-standard forms of agreement do not include uninsurable broad or intermediate form indemnities because the common law duty of care—to take responsibility for one's own fault—is considered sufficient.

Nonetheless, clients routinely expand this common law duty to require that the design professional to defend, indemnify, and hold the client harmless for all losses, damages and defense costs, regardless of whether the design professional is negligent. By law, such broad form indemnities are usually enforceable except for a narrow class of cases in which the client seeks indemnification for its sole negligence. In some jurisdictions or for certain classes of projects, the operation and permissible scope of indemnities are limited by statute.

If the client's contract includes a broad or intermediate form indemnity including the duty to defend, the design professional should seek to convert the defense obligation into a commitment to reimburse the client for its defense costs after a court determines the indemnitor is liable. It should also limit the indemnity to apply only to the extent a claim is caused by the design professional's negligent acts, errors, or omissions in providing services to the client. Finally, the design professional should seek reciprocal indemnities

from the client. If the indemnity provision is not negotiable, it may be a better decision to walk away from the project.

WAIVER OF SUBROGATION RIGHTS:

To further reduce risk and take full advantage of the insurance coverage purchased for a particular project, design professionals may seek the client's agreement to mutual waivers of subrogation rights for personal injury or property damage claims to the extent covered by insurance. Where such subrogation waivers are enforced, they greatly simplify the settlement of claims occurring during construction without putting the client, contractor and design team at odds with each other over who was responsible for the damage.

SITE SAFETY AND OSHA COMPLIANCE:

As design professionals do not have the resources or authority to control the contractor's means and methods or supervise the subcontractor work force, they should not assume contractual responsibility for site safety or OSHA compliance during construction. Design professionals are, however, responsible as employers to comply with OSHA safety regulations for their employees, including those who must access the construction site while work is underway. The contract documents should impose responsibility for creating and enforcing a safety program on the contractor.

Design professionals should also note and respond appropriately to client requests that they practice "safety in design" or "prevention through design" in their development of construction documents for the project. In particular, any references in the proposed contract or reference standards to ANSI/ASSE Standard Z590.3-2011 "Prevention through Design Guidelines for Addressing Occupational Hazards and Risks in Design and Redesign Processes" can impose duties that are difficult to satisfy under current legal standards and uncertainties concerning design effort, cost, schedule, and oversight that are difficult to predict. Any contract term affecting responsibility for worker or occupant safety—either during construction or post-completion—should be carefully scrutinized for the Go/No decision.

LIMITATIONS ON ASSIGNMENT OR DELEGATION:

The client's contract form typically prohibits the design professional from assigning its contract or further delegating its contractual obligations through a subcontract without the client's express authorization. To protect the architect or engineer from the risk of non-payment or collusion between the owner and contractor, this term should be mutual. It should also prohibit the client from assigning either the contract or claims arising from or relating to the contract to a third party. We recommend stating that the contract is an agreement for personal services to further restrict the client's ability to assign the contract without the design professional's consent.

OWNERSHIP AND RE-USE OF DESIGN DOCUMENTS:

The contract should confirm who owns the copyright to design documents developed for the project, and provide appropriate compensation and/or protections to the design professional if the client re-uses the construction documents on a different project. Licenses to use the design documents or an outright transfer of ownership should be conditioned on payment in full of all compensation due the design professional. The contract should also provide a disincentive or outright prohibition for the owner to terminate the contract for convenience at the end of design, to prevent the owner from re-bidding the project in hopes of reducing the cost of completing the design and construction documents, or the cost of construction.

If the client modifies the construction documents without the design professional's assistance, or if those documents are used for any purpose other than completion of construction, the client should defend and indemnify the design professional for any resulting claims or liability.

PROJECT FINANCING:

The design professional's contract should require that the owner (or client if not the owner) to provide adequate proof of financing to complete the project, including the means to pay for any contingencies, changes or extras requested during the course of the work. Inadequate financing or failure to make timely payments should trigger the design professional's right to suspend or terminate the work without penalty.

TERMINATION OR SUSPENSION OF WORK:

The contract should state the conditions allowing suspension or termination of the work, and any notice required before either party may do so. The design professional should require the client to provide a detailed statement of deficiencies in the work (and possibly a supporting expert opinion from another design professional) before the contract is terminated for default. The contract should also allow an adequate opportunity to cure. If the client wishes to have the right to terminate for convenience, the design professional must make certain the contract requires payment for all work performed and expenses reasonably incurred in reliance on the contract.

SELF-CERTIFICATION, LEED, COMMISSIONING, AND OTHER ADDITIONAL SERVICES:

In those jurisdictions that allow the architect or engineer-of-record to self-certify that their construction documents are permit-ready, the client benefits from an expedited start on construction and savings on third party review fees. However, the contract for professional services should make clear that the client is responsible for any corrective or additional work required by the building inspector for code compliance, and that such additional costs do not indicate a breach of the standard of care. Otherwise, the client

may assert a claim against the design professional or refuse to pay for its services on grounds that the permit-ready construction documents were deficient.

Sustainable design principles such as LEED certification, the International Green Construction Code or other local “green” building codes can create unanticipated liability exposure for the design professional. For example, novel building products chosen for their “sustainability” must also be evaluated for their quality, performance and suitability. Where possible, manufacturer or contractor warranties and certifications should be obtained to provide the primary recourse in the event of a performance problem. Care should be taken with recycling and waste diversion strategies—both for demolition and construction waste—to avoid legal liability for toxic or hazardous substances (principally asbestos, lead, or PCB’s) or violation of local law concerning disposal of hazardous or other solid waste. A growing incidence of claims arising from LEED or other high performance building designs justifies evaluation of sustainable design liability risks in the Go/No Go Checklist.

Commissioning and post-occupancy warranty inspections provide a valuable tool for the design professional to identify and correct errors in design or construction while the trade contractors are still responsible for corrective work under their warranties. The contract documents should identify the commissioning agent and required acceptance criteria. Providing commissioning or post-occupancy warranty inspections, when properly conducted, should be a positive rating factor for the Go/No Go decision.

LIQUIDATED DAMAGES, FEE RETENTION, AND OFFSET PROVISIONS:

Any contract term that enables the client to withhold payment of fees or assess liquidated damages before a determination of fault or liability negatively affects project risk. Likewise, granting the client the right to offset against the fee for its alleged damages undercuts the value of the design professional’s insurance coverage. Professional liability insurers will not credit their insured’s deductible or self-insured retention (SIR) obligations for payments withheld by the client, and liquidated damages may run afoul of either the contractual liability or warranty and guaranty exclusions depending on how they are worded. Likewise, any form of offset may create undue financial stress on the design professional and prevent it completing the project. Or it could provide a windfall to the client in paying for betterment that should not be the design professional’s responsibility.

The coercive effect of these contractual risk-shifting provisions must be considered in the Go/No Go decision as it is often the client’s threat to invoke set-off rights that prompts a design professional to settle claims or compromise on its fee when it otherwise would not do so.

DISPUTE RESOLUTION:

While there is no ideal form of dispute resolution that is appropriate for all projects or design professional firms, we recommend that all contracts include a dispute resolution procedure. Where the client and design professional wish to avoid (or defer) litigation in favor of a private resolution of their differences, the contract should require mediation or arbitration of claims and disputes. For large or long-term projects, it may also be prudent to include a dispute resolution board or project neutral requirement in the contract.

Where arbitration or an administrative claims procedure are required—as in public works projects—the contract should also address the right to recover legal fees and costs of dispute resolution. Important procedural rights to mandatory disclosure of documents, application of the rules of evidence, or the standard for review on appeal in the courts must also be detailed in the dispute resolution procedure. The contract’s dispute resolution procedure merits consideration in the Go/No Go decision as it can be either a positive or negative evaluation factor.

OTHER PROVISIONS REQUIRED BY STATE LAW:

A final review of any contract for professional services should assure that it includes any unique provisions required by state law because the standard forms of agreement cannot accommodate the needs of all jurisdictions and a client-drafted agreement may be tailored to the laws of a state or province that does not have jurisdiction over the project or dispute. In most cases, this means the contract must be modified to include a provision for the recovery of legal fees and other expenses (such as expert witness fees or costs of investigation) in either litigation or arbitration. The interest rate applicable to overdue payments should also be specified.

State law may also require the inclusion of other information or statutory notices, such as a contractor’s license number or professional registration number, or notice that the contract requires arbitration or contains a limitation of liability. The complexity of design and construction contracts, and the considerable variation in legal requirements from state to state warrant legal consultation for projects in a new jurisdiction, or new project types, as well as contracts that present significant risk of adverse outcomes as indicated by the Go/No Checklist.

Project Go/No Go Checklist

Date: _____

Project Name: _____

Client Name: _____

Reviewer/Supervisor: _____

RISK FACTOR OR CONTRACT TERM TO REVIEW	POTENTIAL IMPACT ON G/NG DECISION	COMMENTS
Will the estimated profit for this project meet our firm's requirements?	Projects with inadequate fee to earn target profit may not be worth the risk.	
Will our client use a standard form of agreement (AIA, EJCDC, DBIA, or ConsensusDocs), our agreement, or its own contract?	Legal and insurance review of client-drafted contracts is required for G/NG decision. Standard forms of agreement must be reviewed and adapted for jurisdiction and to incorporate our standard modifications.	
Are we hired by project owner, a design-builder or third party?	Contracting with a design/builder rather than the owner changes the risk profile of the project; it can either increase or decrease risk of loss and liability and should be considered in G/NG decision.	
How is our fee calculated? (Lump sum, Percentage of construction cost, Task-based NTE, T&M, Cost reimbursable?)	Lump sum or NTE fees require greater attention to scope definition and contingency to assure profitability of project. Fees tied to cost of construction can lead to disputes with client over VE and change order impacts.	
Does the owner have prior experience with the project type and an experienced management team?	Inexperienced clients for any project type, and those who depend on a volunteer board or committee to make decisions can present additional risk. Scope and fee must be adjusted for additional coordination and documentation effort required.	
Does our client want us to contract with a single-purpose entity (SPE)?	Contracting with an SPE presents a credit risk. In some cases a parent company guarantee of fee should be obtained.	
Does our client want the right to freely assign our contract? Do we have the right to assign or delegate performance under our contract?	We should retain the right to withhold consent to an assignment (except for contingent assignments to lenders) to limit risk in event project is sold to a third party by original client.	
Is the project type suitable for the chosen project delivery system?	Core and Shell buildings, parking structures, or infrastructure projects are well suited to design-build.	

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Go/No Go Checklist

RISK FACTOR OR CONTRACT TERM TO REVIEW	POTENTIAL IMPACT ON G/NG DECISION	COMMENTS
Does the owner or our client (if not the owner) have the right to terminate or suspend the project for its own convenience?	An unlimited right to terminate or suspend for convenience (T4C) can result in loss of anticipated revenue. Consider refusing to allow T4C or restricting it. Consider adding rights for our firm to terminate, and to recover costs incurred due to suspension or T4C.	
Will the project be fast-tracked?	Fast-track construction presents additional risks. The owner must be informed that it may incur additional costs for fast-track construction, and optimization of the design during construction is not evidence of errors or omissions.	
What is the project scope, schedule & owner's initial budget?	Every project needs a scope, budget, and schedule and they must be fixed early in design to avoid disputes and errors or omissions. If the schedule and budget are inadequate for scope, this project may not pass G/NG decision.	
Who has responsibility for cost overruns? How is that risk shared?	Budget and scope discipline will make cost overruns less likely. Contracts should expressly allocate this risk. We should not be subject to risk of cost overruns if we are not in control of project.	
Who has responsibility for (and control of) the design schedule?	The design schedule must be adequate and subject to adjustment for delays in reviews and decisions by owner, jurisdiction, or third parties whose approval is required.	
Have we documented the development of the Project scope?	Scope creep and disappointed expectations are two of the biggest sources of claims and disputes. Documenting decisions and approvals through progressive reviews of the design, frequent cost estimates, and budget discipline mitigate this risk.	
Does the contract require LEED certification, compliance with a "green construction code, or other aspects of sustainable design?	LEED certification strategies involving novel "sustainable" products and waste recycling or re-use may result in claims or disputes. Risks must be assessed and appropriately addressed in the design strategy and QA/QC procedures.	
What is our procedure for design review and approval?	Formal written approval to advance the design reduce risk of client dissatisfaction .	
Does the budget include design and construction contingencies?	Where design and construction are fast-tracked, the budget must include a reasonable contingency for design or construction cost increases. Projects without adequate contingency may not pass GNG decision.	
What services are Owner-provided?	Some project risk can be shared with the owner, such as having owner hire geotechnical engineer or cost estimator. Our contract should include right to rely on information supplied by owner or its other consultants.	

Go/No Go Checklist

RISK FACTOR OR CONTRACT TERM TO REVIEW	POTENTIAL IMPACT ON G/NG DECISION	COMMENTS
What are our warranty obligations?	Warranties and performance standards must be known, reasonable, and included in the cost of the project. Warranties of the design—except a warranty to exercise due professional care—are uninsurable and should not be agreed in contract.	
Does our contract fix an appropriate standard of care?	A standard of care is essential to judging acceptable performance. For design professionals, it must be the prevailing standard in the community for the same or comparable services to be insurable. Elevated standards of care can be uninsurable warranties and may not pass the GNG decision.	
What quality standards apply to our work? How (and by whom) are they determined?	By establishing objective quality standards for completed work, disputes about the owner’s expectations for the project can be diminished.	
Who has responsibility for construction supervision?	This responsibility should be assigned to the contractor or design-builder. This duty should not be assigned to the design consultants.	
Who has responsibility for coordination duties within the design team?	Powers and duties to coordinate the design team should be clearly described. If coordination of the owner’s other consultants is also expected, the fee should allow for that additional duty.	
What inspections are required and who will hire the inspectors?	Another aspect of satisfying the owner’s expectations. Independent inspectors applying objective standards help to assure project success.	
Do we have proper insurance for design and construction risks?	This is a major consideration in G/NG decision. The insurance requirements of the project must be reviewed by our insurance and legal advisors.	
What indemnities are required: For owner? Within the project delivery team?	Proper indemnities are another form of risk sharing, and should be written in terms that are insurable. We should assume legal responsibility for our own acts or omissions but no more.	
Does our contract include a waiver of subrogation rights?	There is no right or wrong answer to this question. If the parties want to limit their loss exposure for property damage or bodily injury claims arising during construction, a waiver of subrogation can limit recourse to available insurance.	
What surety bonds are required? What do they guarantee?	Bonds serve a useful purpose on design-build projects if the owner is willing to pay for them. The contract documents must require a proper bond form from a responsible surety.	
Who is responsible for site safety and OSHA compliance?	The design professional usually does not assume responsibility for safety and OSHA compliance. The contractor or design-builder should enforce a project-specific site safety plan based on a hazard assessment for each task and trade involved in the work.	

Go/No Go Checklist

RISK FACTOR OR CONTRACT TERM TO REVIEW	POTENTIAL IMPACT ON G/NG DECISION	COMMENTS
Does our contract restrict ownership and re-use of design documents?	Ownership of the intellectual property rights in the design documents is an important deal point. Transfer or license of copyright should be tied to payment in full for our services. Restrictions should be imposed on re-use or modification without the design team's involvement, and a fee for re-use of documents may be appropriate.	
Does the project have adequate financing?	An important question to answer early in the project. If the owner cannot provide proof of adequate financing, the project should not proceed.	
What are the terms for termination or suspension of work?	We should have the right to suspend or terminate the work for non-payment, or other disputes that jeopardize our working relationship with our client or the owner.	
Does our contract include environmental hazard abatement, LEED certification, commissioning or additional services?	We should not accept specialty services that we are not qualified to perform. Care must be taken to assure qualified consultants are employed and the fee should be sufficient for the additional duties assumed. The benefits and burdens of LEED certification (e.g., owner's ongoing obligations) should be explained to the client before commencement. Commissioning or post-occupancy warranty inspections can reduce risk of owner/user dissatisfaction with completed project.	
Does the contract allow assessment of liquidated damages, retention, or offset against our fee?	Any term that allows the client to withhold payment or assess costs or liquidated damages can impose unreasonable financial risk. These terms may also trigger exclusions from insurance coverage and should be avoided.	
How are disputes resolved?	The contract should have a dispute resolution procedure. Requirements for mediation, arbitration, or administrative claims or review must be described in the contract. Recovery of litigation expenses, appeal rights and ADR procedures must be described.	
What other contract terms do applicable law require or permit?	Recovery of attorneys' fees, interest on overdue payments, rights to liens or other statutory remedies and requirements that are not covered by a standard contract template should be added to the contract by our legal counsel.	

P. Douglas Folk

Member

P. Douglas Folk serves business clients in architecture, engineering, geomatics, landscape architecture, construction, and other technology-driven industries as a vigorous advocate and trusted advisor. By drawing on his extensive experience in business transactions and commercial litigation, Doug developed practice specialties in construction law, professional liability defense, contracts and negotiations, risk management, administrative law, and government relations. Doug's team at Clark Hill's Phoenix office has tackled difficult negotiations and litigation involving master-planned communities, commercial and mixed-use projects, destination resorts, medical facilities, factories, airports, mines, and infrastructure projects. Doug builds lasting relationships with his clients by finding practical solutions for difficult legal problems.

Doug's practice includes the formation and management of architectural, engineering, and construction companies, as well as other business organizations. Doug promotes sustainable design principles, integrated project delivery methods, and greater use of building information modeling to reduce waste and inefficiency in design, fabrication, and construction. Doug conducts an active trial and appellate practice in the defense of professional liability claims, design and construction defect litigation, OSHA citations, bid protests, lien and bond claims, professional licensing and disciplinary matters, government contracts, and other business disputes. Doug serves as outside general counsel to many of his clients. He is listed in the 2014 editions of Best Lawyers in America® for Construction Law and Litigation, and Southwest Super Lawyers® for Construction Litigation and Professional Liability Defense.

Doug wrote Arizona's Certificate of Merit Act, which requires early disclosure of expert opinions in professional liability cases, and he overhauled Arizona's indemnity laws for public works projects to cure long-standing problems with unfair and uninsurable contracts for government work. Doug has written amicus curiae briefs for the Arizona Supreme Court in precedent-setting cases involving the economic loss doctrine, limitation of liability, and the statute of repose. Through his work as Legal Counsel to the American Council of Engineering Companies of Arizona, and active participation in the American Council of Engineering Companies, US Green Building Council, and American Institute of Architects, Doug has developed a national practice serving design professionals and contractors. He is a member and past chairman of ACEC's Legal Counsel Forum, a member of the Risk Management Committee, and co-chair of the Sustainable Design Subcommittee.

Doug was re-appointed by Governor Jan Brewer in 2013 to his fourth term as the public member of Arizona's Board of Technical Registration. The Board licenses and regulates architects, engineers, land surveyors, landscape architects, geologists and other certified occupations. Drawing on more than two decades of involvement in professional licensing and disciplinary proceedings, Doug consults with design firms, design-builders, and contractors in risk management and professional standards of practice. He is a past Chairman of the Construction Law Section of the State Bar of Arizona and an active member of the American Bar Association's Forum on the Construction Industry. Doug wrote several chapters of the Arizona Construction Law Practice Manual (2d ed.) and was a co-editor of Design Professional and Construction Manager Law published by the American Bar Association Forum on the Construction Industry. He serves as a trainer in the Leadership in Engineering Administration Program and business practices seminars for contractors and design professionals. His community service has been recognized with the Patron and Affiliates Awards bestowed by AIA Arizona, a component of the American Institute of Architects, and Doug was presented with a Presidential Commendation by AIA Arizona at its 2013 Arizona Design Awards.

Doug graduated from the University of Iowa College of Law with Honors in 1980. He is a member of the State Bar of Arizona, and admitted to practice before the US Supreme Court, the Ninth Circuit US Court of Appeals, the US Court of Federal Claims, the US Court of Appeals For the Federal Circuit, and the District Courts of Arizona and Northern Texas.

Experience

- [1800 Ocotillo, LLC v WLB Group, Inc.](#), 219 Ariz. 200, 196 P.3d 222 (2008) – Confirmed that contractual limitations of liability are not against public policy and may be enforced as agreed by a design professional and its client.
- [Flagstaff Affordable Housing Limited Partnership v. Design Alliance, Inc.](#), 223 Ariz. 320, 223 P.3d 664 (2010) – As between a design professional and its client, contractual remedies for recovery of economic loss will bar tort claims seeking the same damages, which enables proper risk allocation through contract negotiations.
- [Albano v. Shea Homes Ltd. P'ship](#), 227 Ariz. 121, 254 P.3d 360 (2011) – Held that Arizona's statute of repose is not tolled by the filing of a class action complaint in construction defect litigation.
- [Sullivan v. Pulte Home Corporation](#) 232 Ariz. 344, 306 P.3d 1 (2013) – Held that a subsequent purchaser's construction defect claim is not barred by the economic loss doctrine or statute of repose, but purchaser may not have a cause of action for negligent construction.



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B.A., Franklin and Marshall College,
Lancaster, Pennsylvania, 1977

State Bar Licenses

Arizona

Court Admissions

U.S. Supreme Court
U.S. Court of Appeals, 9th Circuit
U.S. Court of Federal Claims
U.S. Court of Appeals, Federal
Circuit
U.S. District Ct., N.D. of Texas

Practices, Industries & Services

Construction Law
Government & Public Affairs
Information Governance & Discovery Services

Areas of Emphasis

Appellate
Commercial Litigation
Public/Private Partnerships

Clark Hill Overview



Clark Hill is an entrepreneurial, full service law firm that provides litigation, government & public affairs, and business legal services to our clients throughout the country. With offices in Arizona, Delaware, Illinois, Michigan, New Jersey, Pennsylvania, Washington, D.C. and West Virginia, Clark Hill has more than 300 attorneys and professionals. Clark Hill combines the specialized offerings of a boutique firm and the full range of services provided by a mid-size firm with global reach. Our experienced attorneys and other professionals consistently deliver the results and solutions that our clients have come to trust. Clark Hill clients expect the best, and we always deliver. We understand our clients' business issues, we respond quickly to their needs, and we consistently provide them with sound legal advice.

Our DNA

Clark Hill is built upon a core set of values that guide us in our relationships with our clients, our interactions with each other, and our connection to the communities in which we serve. These values have a real and lasting impact on the way we conduct our business, the way we treat our clients and colleagues, and the way we go about growing our firm. We believe these values come into play in each and every client experience, and are essential to the ultimate success of our lawyers and our firm.

Our DNA consists of four guiding principles:

- Count on More...embracing new ideas, technologies and cutting edge business solutions, we provide relevant legal counsel with industry perspective.
- You're #1...working with passion, commitment and enthusiasm, we approach our practice with a service attitude and structure our relationships to meet the unique needs of our clients.
- Don't Call Me Mr./Ms...encouraging an open-door mentality towards new people and fresh ideas, our humble, highly educated professionals emulate solid values with an innovative edge.
- Sometimes It's Just Black & White...conducting ourselves with the highest-level of integrity and ethics while delivering a high quality product on time and on budget.

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Clark Hill Cares

Clark Hill Cares is the pro-social community involvement effort of Clark Hill PLC, supported throughout the firm. Through

making a difference together



service projects and donations, Clark Hill Cares aims to make a difference in the communities it serves. Since the firm's inception dating back to 1890, Clark Hill, through its employees, has been an active participant in community efforts through organized volunteer programs, pro-bono legal services, and service to the nonprofit community. Our attorneys and other professionals also regularly participate in community associations and have active interests on nonprofit boards, foundations and other community organizations. The firm formally organized these efforts in 2008, by announcing the Clark Hill Cares program.

The first official Clark Hill Cares Service Day, a firm wide volunteer effort, took place on Saturday, June 27, 2009, and included more than 200 volunteers in three states at food banks throughout the region. Our Clark Hill Cares efforts continue throughout the year, with regularly organized fundraising events, sponsorships and an official Service Day, in which all employees and their families are invited to participate.

Commitment to Diversity

Clark Hill PLC is committed to promoting diversity and inclusion in our firm, fostering a collegial and respectful working environment in which each person is encouraged and supported to reach his or her highest potential. We recognize that utilizing the talents of people with a wide range of characteristics, backgrounds and experiences positively impacts every aspect of our firm - first and foremost - our ability to deliver quality legal and professional services to our clients which exceed their expectations. Understanding that a diverse workplace is critical to the firm's ongoing success, we have emphasized diversity and inclusion in our strategic plan.

Diversity itself is an inclusive concept and encompasses a respect for and valuing of many different characteristics of our people, including but not limited to race, religion, color, national origin, sex, veteran's status, age, disability, sexual orientation, gender identity, or any other personal characteristic protected by federal, state, or local law, regulation, or ordinance. We strive to have a workplace that is comfortable and welcoming for everyone by offering the following programs and policies:

- The Firm's Diversity and Inclusion Committee
- Recruiting Diverse Attorneys
- Mentoring and Professional Development
- Involvement in Diverse Organizations

Clark Hill Practices & Industries

As a full-service law firm, we offer clients a clear advantage. Working as a team, our attorneys and professionals from each of the practices and industries listed below regularly collaborate to assess current and future issues. In return, clients receive an unparalleled level of review that is thorough and comprehensive. At Clark Hill, we believe in teamwork, collaboration, and dedicating all available resources to the needs of our clients.

Practices

Banking & Finance
Behavioral Health Care Law
Construction Law
Corporate Law
Corporate Restructuring & Bankruptcy
Environment, Energy & Natural Resources
Estate Planning & Probate
Family Law
Government & Public Affairs
Health Care Law
Immigration Law
Insurance & Reinsurance
Intellectual Property
International Trade
Labor & Employment
Litigation
Municipal Law
Political Law
Professional Ethics & Risk Management
Public Finance
Real Estate
White Collar Criminal Defense

Industry Teams

Aerospace
Automotive Dealerships
Automotive & Manufacturing
Banking
Education
Energy & Utilities
Entertainment
Food & Beverage
Franchise & Licensing
Health Care
Hunting, Outdoor, & Recreational
Insurance
Mining
Oil & Gas
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Why Clark Hill?

We pride ourselves on our ability to listen, understand, and act on our clients' wishes. As our first priority, we make sure we know what each client is looking for in an attorney, in a legal services firm, and in a business relationship. Tailored to the needs of each individual client, our approach allows us to deliver uncompromising, first-rate service and value to a broad range of clients. With our local, regional, and global reach, we offer our clients solutions and unique perspectives that they are unable to find anywhere else.



Predictable

We understand that one size does not fit all. And we also understand that clients need to know the cost of legal services up front. That's why our firm offers a variety of customized billing options designed to meet the needs of each individual client, including fixed, hourly, or retainer billing arrangements. Here at our firm, we also understand budgets and the need to avoid unexpected costs that's why we always consult with clients before we begin providing legal services.

Responsive

Clark Hill clients always know that they can expect timely, accurate answers. We guarantee a 24-hour response time because we know clients can't afford a long wait when they have pressing legal matters. Here at Clark Hill, we have a rapid-response system that provides us access to information for every client need. With digital technology, "electronic brainstorming," and other tools at our disposal, we are always ready to respond when clients need us.

Innovative

In today's rapidly-changing business environment, a generic, cookie-cutter approach is never in anyone's best interest. That's why we tailor our approach to fit the needs of each individual client. With our full-service firm and qualified team of professionals, we offer convenience and value while providing creative, practical considerations for every scenario. With our commitment to leading-edge technologies, we have a number of tools readily available to help us respond to any need that may arise.

Connected

We are well-connected at Clark Hill. Our clients know that with us, they have local, national, and international reach. Through our state, national, and worldwide affiliations and associations, we provide clients access to on-the-ground operations all over the world.

Experienced

At Clark Hill, we make it our business to know your business. In today's fast-paced business environment, we know that clients rely on our expertise to not only understand existing challenges, but also anticipate new ones. We want our clients to be prepared, and, as a result, we spend a lot of time in preparation. That's why our team has a front-end process that helps us identify the full scope of challenges involved in every legal matter that comes our way. We learn the day-to-day operations of each client so that we can provide them with the best, most-informed legal counsel available anywhere.

Clark Hill **is all in.**

Clark Hill's full-service model offers an unmatched depth of integrated resources and talented attorneys and professionals who can anticipate and respond to your ever-changing business needs and challenges.

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